

# CASE LAW UPDATE

Recent Workers' Compensation  
Decisions From the West Virginia  
Supreme Court of Appeals

# Simpson v. W. Va. OIC

223 W. Va. 495, 678 S.E.2d 1 (2009)

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- The Court considered the constitutionality of Rule 20.
- In 2003, the Legislature amended W. Va. Code § 23-4-3b to add subsection (b). The new subsection required the promulgation of a rule establishing a process for the medical management of claims and awards of disability. Among other things, this new rule was to establish ranges of Permanent Partial Disability awards for common injuries and diseases.
- Pursuant to this legislative directive, W. Va. C.S.R. § 85-20-1, *et seq*, commonly referred to as Rule 20, was promulgated by the Workers' Compensation Board of Managers.

# Simpson v. W. Va. OIC

223 W. Va. 495, 678 S.E.2d 1 (2009)

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- The Claimant challenged the constitutionality of Rule 20; specifically, the PPD Ranges for spinal impairments.
- The Claimant argued that the Legislature violated the separation of powers doctrine by delegating rule-making authority in an area that is historically statutory.

# Simpson v. W. Va. OIC

223 W. Va. 495, 678 S.E.2d 1 (2009)

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■ The Court held:

1. W. Va. Code § 23-4-3b(b) which directs the Workers' Compensation Board of Managers to promulgate a rule establishing the process for the medical management of claims and awards of disability is constitutional and does not violate the separation of powers.

2. W. Va. C.S.R. Table § 85-20-C (2004) is valid and is a proper exercise of rule-making authority delegated to the Workers' Compensation Board of Managers by the Legislature in W. Va. Code § 23-4-3b(b).

# Williby v. W. Va. OIC

224 W. Va. 358, 686 S.E.2d 9 (2009)

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- Involved the compensability of an injury that occurred off the Employer's premises during a paid break.
- The Employer allowed its employees two 15 minute paid breaks during the day and an unpaid thirty minute lunch period.
- The claimant used her first 15 minute break to walk across the street to pick up some lunch.
- As the claimant was crossing the street to return to the job, she fell in the middle of the road and injured her shoulder.

# Williby v. W. Va. OIC

224 W. Va. 358, 686 S.E.2d 9 (2009)

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- The Court revisited the “going and coming” rule:

“An injury incurred by a workman, in the course of his travel to his place of work and not on the premises of the employer, does not give right to participation in the Workers’ Compensation fund, unless the place of injury is brought within the scope of employment by an express or implied requirement in the contract of employment, of its use by the servant in going to and returning from work.”

# Williby v. W. Va. OIC

224 W. Va. 358, 686 S.E.2d 9 (2009)

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- In this case the Court noted that the claimant was neither directed to go to a location outside of the bank to pick up her lunch during her break period, nor was she running a “special errand” for her employer.
- In fact, the court held that the claimant’s decision to cross the street to get something to eat was a purely personal function, not involving her employment, and not resulting from her employment.
- Accordingly, the Court held that the claimant’s fall and injury did not occur in the course of or as a result of her employment.

# Bowers v. W.Va. OIC

224 W. Va. 398, 686 S.E.2d 49 (2009)

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- The Court addressed the validity of a Rule 20 provision which required symptoms of a psychiatric disorder to manifest within six months of the underlying compensable injury in order for the psychiatric disorder to be held compensable.



# Bowers v. W.Va. OIC

224 W. Va. 398, 686 S.E.2d 49 (2009)

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- The claimants' requested that depression be added as a compensable component of their claims.
- The claims administrators denied the requests to add a diagnosis of depression to the claims because neither claimant had presented evidence to indicate that they had been diagnosed with depression within six months of their initial injury as required by W.Va. C.S.R. § 85-20-12.2.a.
- The claims administrators' Orders were affirmed by the OOH and BOR.

# Bowers v. W.Va. OIC

224 W. Va. 398, 686 S.E.2d 49 (2009)

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W. Va. C.S.R. §85-20-12.2.a states, in pertinent part:

*In order to be regarded as work-related, symptoms of an injury-related psychiatric diagnosis must be manifest within six months of the injury or significant injury related complication based on credible medical evidence.*

# Bowers v. W.Va. OIC

224 W. Va. 398, 686 S.E.2d 49 (2009)

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- The Court held that while the Legislature may delegate to an administrative agency the power to make rules to implement the statute under which the agency functions, the administrative agency, in exercising that power, may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.
- The Court found W. Va. Code C.S.R. § 85-20-12.2.a to be an invalid administrative rule because it arbitrarily distinguished between psychiatric (non-physical) symptoms of a compensable work-related injury and physical (non-psychiatric) symptoms of the same compensable work-related injury when the Legislature had not made such a distinction.

# Bowers v. W.Va. OIC

224 W. Va. 398, 686 S.E.2d 49 (2009)

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- Specifically, the Court noted that neither W. Va. Code § 23-4-16(b) nor W. Va. Code § 23-5-2 requires that, to be held compensable, symptoms of a work injury-related psychiatric disorder must manifest within six months of the underlying work-related injury or a significant complication thereof.

# Casdorph v. W. Va. OIC

225 W. Va. 94, 690 S.E.2d 102 (2009)

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- Involved the compensability of a claim for Chronic Myelogenous Leukemia (CML).
- Claimant was exposed to benzene while working as a mechanic for the state police.
- Claimant was diagnosed with CML and filed a workers' compensation claim alleging that his CML was a result of his exposure to benzene in the workplace.

# Casdorph v. W. Va. OIC

225 W. Va. 94, 690 S.E.2d 102 (2009)

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- The Commission rejected the claimant's claim based upon a finding that the claimant had failed to establish that CML was contracted in the course of and resulting from his employment.
- The OOI reversed the Commission's Order and found CML to be compensable.
- The BOR reversed the OOI's decision and found that the expert testimony relied upon by the ALJ was insufficient to establish that the claimant had sustained an occupational disease within the meaning of W. Va. Code § 23-4-1(f).

# Casdorph v. W. Va. OIC

225 W. Va. 94, 690 S.E.2d 102 (2009)

- The Court revisited two syllabus points from its prior decision in Powell v. State Workmens' Compensation Commissioner, 166 W. Va. 327, 273 S.E.2d 832 (1980).:
  1. If studies and research clearly link a disease to a particular hazard of a workplace, a prima facie case of causation arises upon a showing that the claimant was exposed to a hazard and is suffering from the disease to which it is connected.
  2. W. Va. Code § 23-4-1 does not require a claimant to prove that the conditions of his employment were the exclusive or sole cause of the disease nor does it require the claimant to show that the disease is peculiar to one industry, work environment, or occupation.

# Casdorph v. W. Va. OIC

225 W. Va. 94, 690 S.E.2d 102 (2009)

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- Taking the claimant's exposure history and the medical and scientific evidence of record into consideration, the Court concluded that the Claimant had met the requirements of W. Va. Code § 23-4-1 and established the compensability of CML.



# Bevins v. W. Va. OIC

2010 W. Va. Lexis 105

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- The Court considered whether a claimant receiving Social Security Disability benefits in connection with a compensable injury can also receive temporary total disability benefits as a result of an aggravation/progression of that same compensable injury?

# Bevins v. W. Va. OIC

2010 W. Va. Lexis 105

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- Two claimants, Mr. Bevins and Mr. Greathouse, filed applications to reopen their workers' compensation claims for TTD benefits.
- In both claims, the claimant's request to reopen for TTD benefits was denied by the claims administrator, and then reversed and granted by the OOJ.

# Bevins v. W. Va. OIC

2010 W. Va. Lexis 105

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- On appeal to the BOR, the Board reversed the OOJ in both claims and found that the claimants were not entitled to TTD benefits because they were receiving Social Security Disability benefits at the time they filed their reopening applications.
- The Board characterized TTD benefits as wage replacement benefits. The Board reasoned that since both claimants were receiving SSDI and not working, they had no wages to replace and were not entitled to TTD benefits.

# Bevins v. W. Va. OIC

2010 W. Va. Lexis 105

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- The Court held that a claimant can simultaneously receive TTD benefits while also receiving SS disability benefits for the same compensable injury.
- The Court held that when a claimant simultaneously receives TTD benefits while also receiving SS disability benefits for the same compensable injury, the federal offset provisions set forth in 42 U.S.C. § 424a operate to preclude the claimant from receiving an impermissible double recovery of benefits.

# Johnson v. W. Va. OIC

2010 W. Va. Lexis 136

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- Involved dependents' benefits and an invalid child.
- Injured worker died of lung cancer in 1989.
- The injured worker's widow filed an application for fatal dependents' death benefits. Whether by mistake or for some other reason, the word "none" was written on the widow's dependent's application in reference to the identity of any surviving dependent children.

# Johnson v. W. Va. OIC

2010 W. Va. Lexis 136

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- The widow's application for dependents' benefits was denied by the Workers' Compensation Commission. The widow protested that decision to the OOC and ultimately to the BOR.
- On April 14, 2000, the widow passed away.
- By Order dated June 18, 2002, the BOR granted the widow's application for fatal dependents' benefits.

# Johnson v. W. Va. OIC

2010 W. Va. Lexis 136

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- On July 22, 2002, the widow's daughter informed the Workers' Compensation Commission that the widow had died. More importantly, the daughter indicated that an invalid son of the deceased injured worker was now entitled to the fatal dependents' benefits.
- The daughter's letter was accompanied by a copy of the invalid son's birth certificate, and a medical report stating that the invalid son suffered from a lifelong psychiatric disorder and required supervision.

# Johnson v. W. Va. OIC

2010 W. Va. Lexis 136

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- In October of 2002, the Workers' Compensation Commission issued a pay order directing the employer to pay the invalid son's guardian death benefits from the date of the injured worker's death to the present.
- Thereafter, pay orders were issued on a monthly basis for the benefit of the invalid child.



# Johnson v. W. Va. OIC

2010 W. Va. Lexis 136

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- In July 2004, the Employer began self-administering its workers' compensation claims.
- On February 17, 2006, the self-insured Employer's third-party administrator issued a notification indicating that the invalid son's death benefits were to be terminated.
- The notice indicated that there was no evidence that the invalid son was a dependent at the time of the injured worker's death, and noted that the 1990 application filed by the widow indicated that there were no dependent children.

# Johnson v. W. Va. OIC

2010 W. Va. Lexis 136

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- The Court found that the evidence of record clearly established the invalid son's lifelong psychiatric disorder and resulting dependency.
- Accordingly, the Court held that the invalid son was entitled to a continuation of his dependent death benefits.

# Davies v. W. Va. OIC

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- Involved the validity of W. Va. C.S.R § 85-20-64.5.
- W. Va. C.S.R. § 85-20-64.5 states:

*Carpal Tunnel Syndrome Impairment:  
An injured worker who can otherwise  
show entitlement to a permanent partial  
disability award for carpal tunnel  
syndrome shall be eligible to receive a  
permanent partial disability award of  
0%-6% in each affected hand.*

# Davies v. W. Va. OIC

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- The claimant underwent a PPD evaluation for carpal tunnel syndrome of the right wrist. The IME doctor found the claimant to have 6% impairment for CTS according to Table 16 of the Fourth Edition of the AMA Guides.
- The IME doctor then adjusted the claimant's CTS impairment according to W. Va. C.S.R § 85-20-64.5. The doctor concluded that the rule allowed awards of 1% to 2% for mild CTS, 3% to 4% for moderate CTS, and 5% to 6% for severe CTS.

# Davies v. W. Va. OIC

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- Because the claimant's CTS impairment was considered mild under the Fourth Edition of the AMA Guides, the doctor recommended a 2% PPD award under W. Va. C.S.R § 85-20-64.5.
- Based upon the IME doctor's findings, the claims administrator issued a protestable order granting the claimant a 2% PPD award.
- The claimant protested the claims administrator's order.

# Davies v. W. Va. OIC

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- The OIJ reversed the claims administrator's order and granted the claimant 6% PPD. Specifically, the OIJ found that W. Va. C.S.R § 85-20-64.5 contained no language to support the interpretation given it by the IME doctor.
- The BOR reversed the OIJ's decision and reinstated the 2% award.

# Davies v. W. Va. OIC

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- On appeal to the Supreme Court, the claimant argued that if the claimant's level of impairment is anything greater than 6%, the maximum PPD award allowable under W. Va. C.S.R § 85-20-64.5, then the impairment must be reduced to 6%. However, if the claimant's level of impairment is 6% or below, then no adjustment is made.
- The Employer argued that that the IME doctor was correct in creating different classifications of impairment within the range set forth in W. Va. C.S.R § 85-20-64.5, to be labeled mild, moderate, or severe, so that the impairment ratings obtained from Table 16 could be distributed among them.

# Davies v. W. Va. OIC

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- The Court rejected the Claimant's argument as producing an absurd, unjust and unreasonable result.
- The Court rejected the Employer's argument based upon a finding that there was no language in the rule itself to support the Employer's interpretation of W. Va. C.S.R § 85-20-64.5.
- The Court held that W. Va. C.S.R § 85-20-64.5 was invalid and could not be applied to CTS ratings assessed under Table 16 of the AMA's Guides to the Evaluation of Permanent Impairment. Specifically, the Court found W. Va. C.S.R § 85-20-64.5 to be in conflict with Table 16 of the Fourth Edition of the AMA Guides.